



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 180 OF 2013

GEORGE AYUNGO.....CLAIMANT

VERSUS

HARDEXO COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 8.2.2013 seeking terminal dues, compensation for unfair termination plus General damages. He contended that he was dismissed verbally for no justifiable reason and without being accorded fair leaving or prior notice. He further contended that from 2009 till April 2012, he was being deducted Kshs.1,000 from his salary as an unlawful surcharge for alleged lost stock and prayed for the same to be paid to him.
2. The respondent denied the alleged dismissal and averred that it is the claimant who deserted employment without any prior notice after a loss of stock and money was discovered. She therefore counterclaimed against him the Kshs.99,000 being the loss caused by the claimant plus one month salary in lieu of notice.
3. The main issue for determination is whether the claimant deserted employment or he was unfairly dismissed by the respondent. The suit was heard on 18.4.2018 when the claimant testified as Cw1 and the respondent called her Director Mr. Kinyua Muriithi who testified as Rw1. Thereafter both parties filed written submissions.

Claimant Evidence

4. Cw1 testified that he was employed by the respondent as a driver in August 2003. The contract was oral and his gross salary was Kshs.17,000 per month. In October 2009, the respondent started deducting his salary by Kshs.1,000 per month to recover an alleged loan which he had not been advanced. The said deduction continued until April 2012 when he was verbally dismissed by the Rw1.
5. Cw1 further testified that on 12.4.2012, he and 3 other employees at the respondent's City Centre shop were summoned to Head Office at Hurlingham. On arrival, they were kept in a room and called individually to meet the Rw1 at his office. Cw1 contended that when his turn came, Rw1 accused him of knowing how theft was going on in the company but failed to report the same and then verbally dismissed him. He contended that the dismissal was unfair because he was not accorded a fair hearing on the alleged theft of stock. He contended that the alleged theft of stock was the unilateral decision by the Branch Manager. He further contended that after the dismissal he was denied his terminal benefits and prayed for the reliefs sought in the suit.
6. On the counter claim, Cw1 denied the alleged desertion of work and maintained that he was verbally dismissed by Rw1 in the presence of the Secretary M/s Akline Muthoni. He therefore prayed for the counter claim to be dismissed.
7. On cross examination Cw1 admitted that he was a member of the NSSF and the employer had remitted all his contributions. He explained that on the fateful day, he was summoned to the Head Office with 4 other colleagues from City Centre branch and they arrived there at 5.30 pm after work as instructed. He admitted that no termination letter was given to him but he was dismissed verbally. He contended that his other colleagues called him and told him that they were dismissed the same day.
8. Cw1 further stated that he secured another job 4 months after the dismissal and denied knowledge of the person who remitted NSSF contributions for him in May, June and July 2012. He further contended that after stock taking was done in 2009, it was alleged that there was a loss in the City Centre branch and his salary started being deducted but he did not protested in fear of losing his job.

Respondent's Evidence

9. Rw1 admitted that Cw1 was his employee but denied that he dismissed him. He testified that on the fateful day, Cw1 and 3 other employees went to his office for investigation of a theft. He explained that he called each of them at a time but he could not conclude the investigations that day because there were documents he was to peruse. Before the end of the month, he learned that the claimant had deserted work without serving notice. He however admitted that he dismissed the other 3 employees after one month after meeting them in his office. He contended that he never dismissed the claimant or reported him to the police because he had learned the guilty persons. He admitted that he never contacted the claimant or bothered to know why he disappeared because he expected him to return to work. He further testified that the claimant had not signed for the goods he was delivering to the shop. He admitted to telling the claimant that he would fire him if he failed to answer the question put to him.

10. As regards the counter claim, Rw1 contended that the claimant and 4 other shop employees agreed to pay Kshs.400,000 in equal shares of Kshs.80,000 and the company decided to recover the same by deducting Kshs.1,000 per month from their salaries until payment in full. He further contended that as at the time he left, he had a balance of Kshs.49,000 still owing. He therefore prayed for the same plus Ksh.17,000 being one month salary in lieu of notice.

Analysis and Determination

11. After careful consideration of the evidence and submissions, there is no dispute that the claimant was employed by the respondent as a driver from August 2003 to April 2012; his salary was Kshs.17,000 per month and that his employment ended at the time when the respondent was investigating theft of stock in the City Centre Branch where he was working. There is further no dispute that from October 2009 to April 2012, the claimant was being deducted Kshs.1,000 from his salary as a surcharge for lost stock. The issue, for determination are:

(a) Whether the claimant deserted his employment or he was unfairly dismissed by the respondent.

(b) Whether the reliefs sought by the suit and the counterclaim should be granted.

Unfair termination or desertion

12. The claimant testified that he was summoned to the head office with three other employees from the City Centre branch and after being interrogated Rw1 separately they were dismissed for alleged theft of stock. Rw1 admitted that he met the claimant and his colleagues on the fateful date but contended that he never dismissed any of them that day because he never concluded the investigations. He later learned that the claimant had deserted work without notice. He however admitted that he dismissed two of his colleagues after finding them guilty of theft.

13. After careful consideration of the evidence and submissions, it is clear that after the meeting on 12.4.2012, the claimant and his other colleagues never reported back to his City Centre branch and nothing was done to trace his whereabouts. If at all they had just deserted, the Branch Manager who had their contact could have called them to find out why they were absent. The failure to do so, I believe it is because, the Director had dismissed them including the claimant and notified the Branch Manager of the City Centre Branch. I further find that the failure by the respondent to call M/s Akline who was allegedly present when the claimant was dismissed has left the claimant's allegation that he was dismissed in her presence, unrebutted. Consequently, I hold that the respondent has not proved on a balance of probability that the claimant deserted work without notice. On the other hand, I am satisfied that the claimant has proved on balance of probability that he was dismissed from employment by the Rw1 on 12.4.2012 in the presence of M/s Akline Muthoni.

14. Under section 45(2) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and after following a fair procedure. In this case, the reason for termination was theft of stock.

Rw1 admitted that he did not know who had the custody of the lost stock. He further did not tender any evidence to connect the claimant with the alleged theft. Consequently, I find and hold that the respondent has failed to prove on a balance of probability the reason for dismissing the claimant.

15. In addition, I find that the respondent has failed to prove that she followed a fair procedure before dismissing the claimant under section 41 of the Act, before dismissing the claimant on ground of misconduct, the employer must first explain to the employee in a language he understands, and in the presence of a fellow employee or shop floor union official of his choice, the reason for which termination is being considered and thereafter, invite the employee and his chosen companion to air their representations for consideration before the termination is decided. The foregoing mandatory procedure was not followed and as such the termination was unfair with the meaning of section 45 of the Act.

Relief

16. Under section 49 of the Act, I award the claimant Kshs.17,000 being one month salary in lieu of notice plus Kshs.204,000 being 12 months' salary compensation for unfair dismissal. In awarding the maximum compensation I have considered the lengthy period of service of 9 years and also the fact that no misconduct was proved against the claimant that contributed to the dismissal.

17. The claim for leave is dismissed in consideration of the undisputed evidence that he was being paid cash for leave every December. Likewise, the claim for house allowance is dismissed because the claimant admitted in paragraph 11 of his written testimony that he was earning a gross pay of Kshs.17,000 as indicated in his payslips. In addition the claim for General damages is dismissed for lack of particulars and evidence.

18. The claim for Kshs.31,000 being the total sum deducted from the alleged loss of stock from October 2009 to April 2012 is also granted. Rw1 alleged that the claimant and his colleagues had agreed to pay Kshs.80,000 each but the claimant denied that. No written agreement was produced to prove that the claimant had accepted liability to pay Kshs.80,000 and authorised for his salary deduction. There is further no evidence tendered to prove that the claimant was liable to pay the said Kshs.80,000 to the respondent. Consequently, I find that the deduction of the Kshs.1,000 per month from his salary was unlawful and should be paid to him.

19. In view of the foregoing finding and the earlier finding that the claim never deserted employment as alleged by the respondent, I dismiss the counterclaim in its entirety.

Conclusion and Disposition

20. For the reason that the claimant was unfairly dismissed and that Ksh.31,000 had been unlawfully deducted from his salary, I enter judgement for him in the sum of Kshs.252,000 plus costs and interest.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE